No. 4533

United States Circuit Court of Appeals

For the Ninth Circuit.

HARTLEY WALKER,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

TORMEY & O'LEARY,
Attorneys for Plaintiff in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

Plaintiff in error was informed against by the United States Attorney for the Northern District of California; the information charging him with violation of the National Prohibition Law on two counts.

First Count. With wilful and unlawful possession of certain property designed for the manufacture of liquor, to wit: one 40-gallon still (complete); one 35-gallon still (complete), all in operation; one 10-gallon still (complete); 30 gallons J. A. B. and 400 gallons of mash at the premises No. 826 Sonoma Street, Vallejo, in the county of *Sonoma,* in the Northern Division of the District of California, in violation of section 25 of the Title II of the Act of

Congress of October 28, 1919, to wit: the National Prohibition Act. (P. 3, Record.)

Second Count. With the maintaining of a common nuisance at 826 Sonoma Street, Vallejo, in the county of Solano, in that he did then and there wilfully, knowingly and unlawfully, manufacture on the premises aforesaid certain intoxicating liquor, to wit: 30 gallons Jackass Brandy in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit: the National Prohibition Act. (PP. 5 and 6, Record.)

To this information plaintiff in error pleaded not guilty (P. 9, Record). After trial the jury brought in a general verdict of guilty against plaintiff in error. (P. 11, Record.) And thereafter the Court pronounced and entered the judgment, and sentenced plaintiff in error to be imprisoned for the period of one year and that he pay a fine in the sum of $1,000.00, and further ordered that in default of the payment of said fine that said defendant be imprisoned until said fine be paid or until he be otherwise discharged in due course of law. (P. 12, Record.)

From this judgment plaintiff in error sued out a writ of error to this Court (PP. 15 and 16, Record); and with his petition for such writ he filed with the clerk of the District Court an assignment of error (PP. 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26, Record).

Writ of error was allowed by the District Court. (PP. 48 and 49, Record.)

The only evidence adduced at the trial is as follows: the plaintiff in error resides in one of the apartments in an apartment house, No. 826 Sonoma Street, Vallejo, Solano County, California (PP. 42 and 43, Record).

On December 4th, 1924, the date mentioned in the information, three Federal Prohibition Agents: C. L. Murr, E. G. Felt and John F. Hall, entered the apartment of plaintiff in error, being one of the apartments in the apartment house No. 826 Sonoma Street, Vallejo, Solano County, California (PP. 28 and 29, Record). Murr stated that he and the other agents entered the premises at 826 Sonoma Street, Vallejo, Solano County, with a search-warrant; Agent Hall having the search-warrant and went to the front door; Murr and Felt going to the back door, over the premises and around to the back of the house. After gaining entrance to the property of plaintiff in error by virtue of the search-warrant, Murr and Felt discovered the stills in question, in a little addition built on to the house of Walker in the rear. (PP. 28 and 29, Record.) On cross-examination, Murr testified that the first time that he ever saw the stills was on December 4, 1924, after he entered upon the aforesaid premises by virtue and authority of the search-warrant in question (P. 33, Record).

Agent Felt testified that on December 4, 1924, we entered these premises by virtue of the search-warrant. Agent Murr and I went to the rear; there were no connecting doors at all from the front of the building; to enter the main building

you had to go through a door and we could see these stills running there, all in operation (P. 24, Record). On cross-examination Officer Felt testified that the premises searched was an apartment house No. 826 Sonoma Street, Vallejo; Felt further testified in answer to the question, you were operating that day by virtue of a search-warrant, to which he answered "nothing else" (P. 37, Record). Officer Hall testified that on December 4, 1924, he raided the apartment of Hartley Walker, at 826 Sonoma Street, Vallejo, and found in operation there, three stills. (P. 38, Record.) On direct examination by counsel of the Government, Officer Hall was asked "Could you smell this place?" to which he answered, he could after he entered the premises. (P. 40, Record.) On cross-examination Hall testified he did not smell the odor all around the premises or all around the neighborhood (P. 40, Record). Officer Hall further testified that he was operating under authority and by virtue of the search-warrant and was on the premises of the defendant before he saw the still. (P. 40, Record.)

The questions involved herein are:

I.

The District Court erred in admitting evidence to show that any offense was committed by the defendant at the premises described in the search-warrant. Assignment of Error No. 10 (P. 18, Record).

II.

The Court erred in denying defendant's motion

to suppress evidence and dismiss information. Assignment of Error No. 11 (P. 18, Record).

III.

The Court erred in admitting evidence as to the first count of said information to show that the defendant had committed any offense at 826 Sonoma Street, Vallejo, Solano County, Assignment of Error No. 12 (P. 25, Record).

IV.

The Court erred in admitting evidence as to the second count of the information to show that the defendant had committed any offense at 826 Sonoma Street, Solano County. Assignment of Error No. 13 (P. 25, Record).

V.

The District Court erred in entering said judgment and imposing sentence upon the verdict of guilty in the manner and form as done. Assignment of Error No. 14 (P. 25, Record).

VI.

The Court erred in pronouncing judgment upon said verdict. Assignment of Error No. 15 (P. 26, Record).

VII.

The Court erred in its charge to the jury.

VIII.

The first count of the information alleges that an offense was committed in the county of *Sonoma* (P. 2, Record), and plaintiff in error cannot, under the law, be convicted on count one.

IX.

Count two of information alleges that an offense

was committed in the county of Solano (P. 5, Record), and plaintiff in error cannot, under the law, be convicted on count two.

X.

In a criminal case the Court should consider any plain error, vital to the defendant, even though the points involved were not presented to the trial court by demurrer, motion, exceptions, or specified in the assignment of error.

XI.

That the information under which said defendant was tried failed to state facts sufficient to constitute a public offense. Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 9 (PP. 17 and 18, Record). And further that count one and count two of said information are indefinite in this: Count one does not charge a public offense as required by law for the reason that said count is indefinite as to time, place and as to the party charged with the offense. Count two is indefinite for the reason that it does not state a public offense in the manner as required by law, Assignment of Error No. 7 (P. 18, Record).

SPECIFICATIONS OF ERRORS RELIED ON BY PLAINTIFF IN ERROR.

I.

The First Count of the information does not state that a public offense was committed upon the premises of plaintiff in error, in Solano County, and the Court had no jurisdiction to render judg-

ment thereon. The premises searched was an apartment house containing several apartments. The number of the apartment house is 826 Sonoma Street, city of Vallejo, county of Solano. The officers were directed by a search-warrant to search No. 826 Sonoma Street, Solano County, which is an apartment house containing several apartments. They had no authorization under said search-warrant to search the premises of plaintiff in error. (United States vs. Inneli, 286 Federal, p. 731), (United States vs. Mitchell, 274 Federal, p. 128), (under the Fourth Amendment property to be searched must be described.) And again count one alleges a violation in the county of Sonoma (P. 3, Record), whereas the apartment house referred to is in Solano County.

The Court erred in admitting evidence procured at 826 Sonoma Street, Solano County, over defendant's objection. There is no evidence to sustain the conviction upon the first count of the information.

II.

Count one of the information alleges that plaintiff in error was in possession of implements designed to manufacture intoxicating liquor in Sonoma County (P. 3, Record). And count two alleges that plaintiff in error maintained a common nuisance in Solano County (P. 5, Record). The Court erred in admitting evidence procured at 826 Sonoma Street, Vallejo, county of Solano. There is no evidence to sustain the conviction upon the second count of the information.

The Court erred in entering judgment as to count one for the reason that in count one defendant is charged with the possession of implements designed to manufacture intoxicating liquor and said count is not supported by affidavit as required by law in this that said affidavit is in support of a common nuisance (P. 4, Record), and further said affidavit in support of said first count does not set out who was in possession of said property or when or where such possession was had of said property (P. 4, Record).

The Court erred in entering judgment as to second count for the reason that said second count is not supported by affidavit as required by law in this that said affidavit does not set forth that John F. Hall, the officer who signs said affidavit, was first duly sworn or that he charged said plaintiff in error with any offense (P. 6, Record), and further, count one alleges possession of implements designed to manufacture intoxicating liquor. Count two alleges maintaining a common nuisance, and both counts are supported by affidavit for common nuisance by two different Prohibition Agents (PP. 4 and 8, Record). The most important part of both affidavits are left in blank and therefore do not conform or meet the requirements as provided by law.

III.

The Court erred in denying defendant's motion to suppress evidence and to dismiss the information on the ground that the search was unlawful and void (PP. 23 and 24, Record), for the follow-

ing reasons: The affidavit on which the warrant was issued sets forth no facts from which the existence of probable cause could be determined (Exhibit "A," PP. 19 and 20, Record); nor did the warrant itself recite the existence of such cause (PP. 21 and 22, Record). There was no recital in the warrant that the officer who issued it found or determined there was probable cause, further than the mere statement that someone had declared under oath that he had good reason to believe and did believe the accused was violating the law (PP. 19 and 20, Record).

Affidavit to secure search-warrant must set forth definite facts in the personal knowledge of the affiant and a search-warrant issued upon the information and belief of the affiant cannot be valid for any purpose (United States vs. Armstrong, 274 Federal, P. 506, hence an affidavit "that there is probable cause and reasonable grounds for believing that intoxicating liquors are being sold or suspected of being sold or disposed of," etc., is insufficient under the Fourth Amendment (Mabry vs. Commonwealth (Ky.), 245 S. W., P. 129).

An examination of the entire affidavit is convincing that all of it was based upon mere belief and it necessarily follows that the search-warrant issued thereon was fatally defective and void (United States vs. Rey, 275 Federal, P. 1004). "No search-warrant shall be issued unless the Judge has been furnished with facts under oath, not suspicions, beliefs or surmises, but *facts.*"

The findings of the legal conclusion or of probable cause from the exhibited facts is a judicial function and it cannot be delegated by the Judge to the accuser. "Hence an affiant stating merely that a violation of the Prohibition Act has been committed or is being committed and that affiant has reason to believe that there are illegaly manufactured liquors and an illicit still on the premises, is entirely insufficient to authorize the issuance of a search-warrant (United States vs. Kelich, Federal, 272, P. 484).

The Court erred again in denying defendant's motion to suppress evidence in this: that the rules of said Court provide that notice of Motion supported by affidavit of defendant when duly filed, defendant is entitled to demand that a counter-affidavit be filed and that argument on same be heard when the matter is duly placed upon the calendar. There is nothing in the record to show that the Government complied with the rules of the Court but insisted that the defendant do so in order that his rights be reserved.

The Court erred in admitting evidence as to Count Two over Plaintiff in Error's objections (p. 32, Record), for the following reasons: That Count Two was not filed until after jury was impaneled and all witnesses for the Government had testified with the exception of Officer Hall (pp. 38 and 39, Record). The only evidence in support of Count Two was that of Officer Hall (pp. 38 and 39, Record). The Court erred in allowing Second Count to be filed at a time when the case was nearly con-

cluded (p. 38, Record). There is not sufficient evidence to support a conviction on the Second Count. Count Two of the information alleges that Plaintiff in Error maintained a common nuisance at 826 Sonoma Street, Vallejo (p. 5, Record). It is further alleged in said information "that the maintenance of said nuisance in the manufacture of said intoxicating liquor at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 21 of Title II of the National Prohibition Act. The only evidence to support Count Two is the testimony of Officer Hall (pp. 38 and 39, Record), and is insufficient to support a conviction as to Count Two. It is the maintenance of the place which constitutes the offense (United States vs. Cohen, 268 Federal, p. 420), (Riggs vs. United States, 299 Federal, p. 273), (United States vs. Dowling, 278 Federal, p. 630), and there is no evidence to show that the premises referred to were maintained for the manufacture of intoxicating liquors.

The Court erred in pronouncing judgment upon said verdict in the manner and form as done. Assignment of Error No. 15 (pp. 13 and 14, Record). The judgment is "That said Defendant be imprisoned for a period of one year in the County Jail, Sacramento County, California, and that he pay a fine in the sum of $1000.00" (p. 14, Record), but did not state for what offense. The Court erred in pronouncing judgment as done in this: That it cannot be ascertained upon what offense

judgment was pronounced (pp. 13 and 14, Record). (Reynolds vs. United States, 280 Federal, p. 1.)

Second Count of said information does not state a public offense. In this: Count Two alleges a violation of Section 21 of Title II as follows: "That Plaintiff in Error on or about the 4th day of December, 1924, at 826 Sonoma Street, Vallejo, in the County of Solano, in the Northern Division of the Northern District of California and within the jurisdiction of this Court then and there being, did then and there wilfully and unlawfully maintain a common nuisance in that the said defendant did then and there wilfully, knowingly and unlawfully manufacture on the premises aforesaid certain intoxicating liquors, etc." (pp. 7 and 8, Record). The premises aforesaid are not the premises of plaintiff in error, but an apartment house (testimony of Officer Felt, p. 36, Record).

It is not the manufacturing of intoxicating liquor that constitutes the offense, but it is the maintenance of the place. (United States vs. Cohen, 268 Federal, p. 420), (Riggs vs. United States, 298 Federal, p. 273), (United States vs. Dowling, 278 Federal, p. 630).

There is nothing in the record to show that the place or premises of plaintiff in error were maintained for the manufacture of intoxicating liquor.

There is no evidence in the record to sustain a conviction on Count Two. The only evidence being the testimony of Officer Hall (pp. 38 and 39, Record).

Count One does not charge a public offense as required by law (Assignment of Error No. 4) (p. 17, Record), for the reason that same is indefinite as to time, place and as to the party charged with the offense; Count Two is indefinite for the reason that it does not state a public offense in the manner as required by law, Assignment of Error No. 7 (p. 18, Record), in that it does not state at what place or any place which was maintained by plaintiff in error for the purpose of manufacturing intoxicating liquor (in a criminal case, the law requires that the information or indictment must be definite or it is fatally defective).

The conviction of plaintiff in error upon both Counts of the information was illegal, for the reason that they were each based upon the same facts, and the Court had no jurisdiction to sentence him in the manner as done, that is to say, "Without stating for what offense said sentence was pronounced" (Reynolds vs. United States, 280 Federal, pp. 1, 3, and 4).

The Court erred in its charges to the jury (p. 45, Record). The Court said "at the same time, Gentlemen, if you find that he was actually manufacturing or had been actually manufacturing Jackass Brandy or other alcoholic liquors, containing more than one-half of one per cent by volume and fit for beverage purposes, then you will find him guilty upon the other Count, which is technically a nuisance, that is to say, maintaining a place where alcoholic liquor is manufactured." (P. 45, Record.) It is not the manufacturing of intoxicating liquor

which constitutes the offense of maintaining a common nuisance as charged in Count Two of said information (United States vs. Cohen, 268 Federal, p. 420), (Riggs vs. United States, 299 Federal, p. 273), (United States vs. Dowling, 278 Federal, p. 630). There was no exceptions taken as to the charge to the jury nor does the error complained of appear in the assignment of error, but, "in a criminal case the Court should consider any plain error vital to the defendant even though the points involved were not presented to the trial court by demurrer, motion, exceptions or specified in the assignment of error. Included in the errors vital to plaintiff in error the Court is asked to consider:

I.

There is no evidence to sustain a conviction upon the First Count. The Second Count of the information does not charge that a public offense was committed as required by law.

II.

The Court denied defendant's motion to suppress evidence even though same was supported by affidavit as required by the rule of this Court and no counter-affidavit was filed by the Government as required by rule of this court.

III.

Plaintiff in error was convicted upon Two Counts, both of which were based upon the same facts, and the Court had no jurisdiction to sentence him in the manner as done, that is to say, that the Court did not state for what offense said judgment was pronounced.

Plaintiff in error's motion to suppress evidence on the ground that the search-warrant was unlawful and void should be granted, and the information dismissed.

The judgment should be reversed.

Respectfully submitted,

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